

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1910.
August 4.
CHHAGANLAL KISHOREDAS (ORIGINAL PLAINTIFF), APPELLANT, v.
THE COLLECTOR OF KAIRA (ORIGINAL DEFENDANT), RESPONDENT.*

*Civil Procedure Code (Act XIV of 1882), section 424—Suit against Government
—Notice—Bhāgdāri and Narvādāri Act (Bombay Act V of 1862),
section 3 †—Mortgage of a narva—Collector declaring the mortgage
invalid—Suit against Collector without notice.*

The plaintiff filed a suit against the Collector of Kaira to obtain a declaration that an order passed by that officer under section 3 of the Bhāgdāri and Narvādāri Act (Bombay Act V of 1862), declaring some mortgages in plaintiff's favour null and void, was inoperative. No notice was given to the defendant as provided for by section 424 of the Civil Procedure Code of 1882 :—

Held, that the notice required by section 424 of the Civil Procedure Code of 1882 was necessary to be given; for the declaration was a distinct act of the Collector, done in the exercise of a statutory power and therefore in his official capacity.

* Second Appcal No. 666 of 1909.

† The section runs as follows :—

3. It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhāg or share in bhāgdāri or narvādāri village other than a recognized sub-division of such bhāg or share, or to alienate, assign, mortgage or otherwise charge or incumber any homestead, building-site (gabhān) or premises appurtenant or appendant to any such bhāg or share or recognized sub-division, appurtenant or appendant thereto, apart or separately from any such bhāg or share, or recognized sub-division thereof.

Any alienation, assignment, mortgage, charge or incumbrance contrary to the provisions of this section, shall be null and void; and it shall be lawful for the Collector or other chief revenue-officer of the district, whenever he shall, upon due inquiry, find that any person or persons is or are in possession of any portion of any bhāg or share of any homestead, building-site (gabhān) or premises appurtenant or appendant to such bhāg or share in any bhāgdāri or narvādāri village other than a recognized sub-division of such bhāg or share, in violation of any of the provisions of this section, summarily to remove him or them from such possession, and to restore the possession to the person or persons whom the Collector shall deem to be entitled thereto;

And any suit brought to try the validity of any order or orders which the Collector may make in such matter must be brought within three months after the execution of such order or orders.

Per Curiam.—"The true test of an action for the purposes of section 424 is whether the wrong complained of as having been done by the public officer sued amounts, first, to a distinct act on his part, and secondly, whether that act purported to have been done by him in his official capacity. Both these elements must combine to render necessary the giving of notice under section 424 as a condition precedent to suit."

APPEAL from the decision of C. V. Vernon, District Judge of Ahmedabad, confirming the decree passed by K. Barlee, Assistant Judge of Ahmedabad.

Suit for declaration.

The plaintiff held two mortgages on certain lands belonging to one Lakshmidas. These mortgages were subsequently declared null and void by the Collector of Kaira under section 3 of the Bhágdári and Narvádári Act (Bombay Act V of 1862). The heirs of Lakshmidas entered into possession of the lands on the strength of that order.

The plaintiff filed a suit against the Collector of Kaira for a declaration that the order passed by him under section 3 of the Bhágdári Act was null and void. The notice required by section 424 of the Civil Procedure Code of 1882 was not given.

The preliminary issue raised in the Court of first instance was, whether the suit was bad owing to the want of notice under section 424 of the Civil Procedure Code of 1882. The Court held that want of notice was a fatal defect in the case. On appeal this decree was confirmed by the District Judge.

The plaintiff appealed to the High Court.

T. R. Desai, for the appellant:—

We submit first that notice required by section 424 is only confined to actions in tort: *Shakebzadee Shahunshah Begum v. Fergusson*⁽¹⁾. The section does not apply where the suit is one *ex contractu* (*Rajmal v. Hanmant*⁽²⁾). See also *Bhau Balapa v. Nana*⁽³⁾, *Flower v. Local Board of Low Leyton*⁽⁴⁾. We further contend that in any view, notice is not required in cases under the Bhágdári and Narvádári Act. The Act is a complete

(1) (1881) 7 Cal. 499.

(2) (1895) 20 Bom. 697-

(3) (1888) 13 Bom. 343.

(4) (1877) 5 Ch. D. 347.

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enactment by itself. It provides for suit against the Collector—not the Secretary of State; and has a special period of three months within which the suit must be instituted. If section 424 of the Civil Procedure Code of 1882 is read along with it, then the period provided by the Bhágdári Act is likely to be curtailed.

G. S. Rao, Government Pleader, for the respondent:—

We say that the notice under section 424 is necessary, where the Act complained of is done by a public officer in discharge of his duty as such officer. The reasoning in *Shahbezadee Shahunshah Begum v. Fergusson*⁽¹⁾ is not accepted in *The Secretary of State for India in Council v. Rajlucki Debi*⁽²⁾. The Bhágdári Act is not an enactment complete by itself. It does not dispense with the notice under section 424 of the Civil Procedure Code of 1882; and the latter Code makes no reservation in favour of the Bhágdári Act.

CHANDAVARKAR, J.:—There are no doubt *dicta* in some of the decisions of this Court, which, detached from the context, would seem to lend support to the view that section 424 of the old Code of Civil Procedure (Act XIV of 1882), reproduced as section 80 of the new Code, applies only to actions in tort. But carefully examined, those decisions lay down that actions *ex contractu* are excluded from the operation of the section. The true test of an action for the purposes of section 424 is whether the wrong complained of as having been done by the public officer sued amounts, first, to a distinct act on his part, and, secondly, whether that act purported to have been done by him in his official capacity (*Bhan Balaya v. Nana*⁽³⁾). Both these elements must combine to render necessary the giving of notice under section 424 as a condition precedent to suit.

In the present case they both exist. What is complained of is that in the exercise of the power conferred upon him by the provisions of section 3 of the Bhágdári Act (Bombay Act V of 1862), the Collector has declared the plaintiff's mortgages illegal

(1) (1881) 7 Cal. 499.

(2) (1897) 25 Cal. 239 at p. 243.

(3) (1888) 13 Bom. 343.

and inoperative, and that thereby he has enabled one of the mortgagor's heirs to take possession of the land mortgaged with possession to the plaintiff; and the Court is asked to set aside the Collector's order, containing the declaration, as null and void. The declaration is a distinct act of the Collector, done in the exercise of a statutory power and therefore in his official capacity.

But it is urged that section 424 must be held not to apply to such a suit, brought under the Bhágdári Act, because, it is said, the Act is a complete piece of legislation by itself for its own purposes and is unaffected by the provisions of section 424 of the Code. This argument is based upon the fact that, according to section 3 of the Act, a suit to set aside the Collector's order as invalid must be brought within three months from the date of its execution, whereas, according to section 424, no suit against a public officer can be brought "until the expiration of two months next after notice in writing has been delivered to or left at the office of" the officer. It is contended that the application of section 424 to a suit under section 3 of the Bhágdári Act has the inevitable result of cutting down the three months' period of limitation prescribed in the section to one month, and that the Legislature must not be presumed to have contemplated such a result and the taking away partly by means of the Code what it had given by means of the Act.

But the same may be urged in the case of every suit against a public officer in respect of an act done in his official capacity. In the case of every wrong done by him in his official capacity, which gives a cause of action and right to sue, the Limitation Act provides a period within which he must be sued; and that period is necessarily shortened by the period of two months in section 424 of the Code of Civil Procedure. It does not therefore follow, and it can hardly be contended, that section 424 does not apply. To hold that would be to render the provisions of that section practically nugatory.

We must presume that in enacting section 424, the Legislature was aware of the provisions of section 3 of the Bhágdári Act, and that, had it intended to exclude that section from the

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operation of section 424, it would have used apt language to convey its meaning. The construction contended for by the appellant's pleader seeks to add words to section 424, which are not in it. That is not construction but legislation.

No doubt if the two sections were mutually repugnant, that construction would be sound and sensible. But they are easily reconcilable. Section 3 of the Bhágdári Act points to the period *within* which the suit must be presented; section 424 of the Code limits the period *after* which the action must be filed. And the latter does not totally render the former abortive but leaves some period for the filing of the suit within the three months prescribed by the Act. That may cause some inconvenience and hardship; but "arguments *ab-inconvenienti* must be used with great reserve when they are opposed to the grammar of a statute, but are of great weight in determining between two constructions, each consistent with the grammar." *Wentworth v. Humphrey*⁽¹⁾. Laws are framed with an eye to cases which frequently occur and "it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom." *Fenton v. Hampton*⁽²⁾. If there is any hardship, and even if it could be proved that a mistake has been made by the Legislature in enacting the provisions of section 424, in forgetfulness of section 32 of the Bhágdári Act, "it would not be competent for a Court of law to disregard its enactments. If a mistake has been made, the Legislature alone can correct it". *Labrador Company v. The Queen*⁽³⁾.

For these reasons we are of opinion that the lower Courts have rightly held that section 424 of Act XIV of 1882 applied to this suit, and that, as its provisions were not complied with by the plaintiff, the suit must be dismissed. The decree must, therefore, be confirmed with costs.

Decree confirmed.

R. R.

(1) (1886) 11 App. Cas. 619 at p. 626. (2) (1858) 11 M. P. C. 347, 365.

(3) (1893) A. C. 104 at p. 123.